

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman and Commissioners Downey, Knox, Scott and Swanson

From: Holly B. Armstrong, Commission Staff Counsel
John W. Wallace, Senior Commission Counsel
Luisa Menchaca, General Counsel

Re: Proposition 34 Regulations: Treatment of Outstanding Debt (§ 85316) –
Adoption of Proposed Regulation 18531.6

Date: August 27, 2001

Introduction and History

As a result of the changes to the Political Reform Act (“the Act”) brought about by Proposition 34, effective January 1, 2001, the Act imposes limitations on post-election fundraising.

Government Code § 85316¹ provides:

A contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election.

At the meeting on June 8, 2001, this regulation came before the Commission for a first pre-notice discussion. In that context, the Commission considered two broad policy issues: (1) whether Section 85316 should be applied to elections that were held prior to January 1, 2001, and (2) whether candidates should be required to use funds raised post-election to retire debt from that election, or whether Section 85316 merely imposed a cap (equal to the amount of net debt) on post-election fundraising, without limiting the use of those funds to debt repayment.

On the first issue, the Commission decided that neither Section 85316 nor Proposition 34’s contribution limits, found in Sections 85301 and 85302, apply to pre-2001 elections. The Commission did not reach a consensus on the second issue.

¹ All statutory references are to the Government Code, unless otherwise specified.

The regulation came before the Commission for a second pre-notice discussion at the Commission's July 9, 2001, meeting, and the following decisions were made by the Commission:

- The Commission confirmed and clarified its earlier decision that Section 85316 does not apply to elections held prior to January 1, 2001.
- The Commission further clarified that Proposition 73's special election contribution limits in effect prior to January 1, 2001, were not applicable to contributions made after January 1, 2001, for those elections.
- The Commission also decided that candidates in post-January 1, 2001, elections may use funds raised after the election only to pay outstanding debt from that election.
- The Commission determined that Proposition 34's contribution limits apply to any candidate controlled committee formed on or after January 1, 2001, and that it was appropriate to subject transfers to committees formed for post-January 1, 2001, elections to the requirements of the transfer regulation, Regulation 18536.
- The Commission accepted in part the proposed definition of "net debts outstanding," but requested clarification of certain points within the definition. These points are dealt with herein.
- Finally, the Commission decided that Section 83 of Proposition 34² should be construed in a manner that was consistent and parallel in construction with its decision that Section 85316 does not apply to elections held before January 1, 2001.

DISCUSSION OF PROPOSED REGULATION 18531.6 AND DECISION POINTS

Proposed Regulation 18531.6 is organized into two main sections, the first dealing with pre-2001 elections and the second dealing with 2001 and subsequent elections.

Subdivision (a) addresses pre-2001 elections and codifies the Commission's first policy decision, that Section 85316 does not apply to candidates in elections held prior to January 1, 2001.

Implementation of Non-Substantive Clarifying Changes

Subdivision (a)(1) contains bracketed language that represents the first clarifying change:

² Section 83 of Proposition 34, an uncodified provision, states: "This act shall become operative on January 1, 2001. However, Chapter 5 (commencing with Section 85100) of Title 9 of the Government Code, except subdivision (a) of Section 85309 of the Government Code, shall apply to candidates for statewide elective office beginning on and after November 6, 2002." As amended by Proposition 34 "[s]tatewide elective office' means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction and member of the State Board of Equalization." (Section 82053.) The limitations in effect as of January 1, 2001, therefore, apply generally to legislative offices.

(a)(1) There are no contribution limits in effect for elections held prior to January 1, 2001 [for contributions made on or after January 1, 2001].

Subdivision (a)(1) of the proposed regulation specifies that there are no contribution limits in effect for elections held prior to January 1, 2001. The bracketed language serves only to clarify that Proposition 73's special election contribution limits do not apply to contributions made on or after January 1, 2001. In contrast, any over-limit contributions to special elections subject to the Proposition 73 limits made or accepted prior to January 1, 2001, are subject to those rules. This issue has already been the subject of two Commission advice letters, the *Kaufman* Advice Letter, No. A-01-159, and the *Bauer* Advice Letter, No. A-01-044 (rescinded by the Commission at its July 2001 meeting).

Staff has received no public comment concerning this clarifying language.

Subdivision (a)(2) of the proposed regulation specifies that Section 85316's limitation on contributions raised after an election to the amount of "net debts outstanding" does not apply to contributions for an election held prior to January 1, 2001.

Subdivision (b) of the proposed regulation is directed to 2001 and subsequent elections. Subdivision (b)(1) would prohibit a candidate from attempting to re-open a closed pre-January 1, 2001, committee³ to take advantage of unlimited fundraising opportunities permitted for these prior elections.

Subdivision (b)(2) presents another non-substantive clarification. This is new language, which relates to an issue previously presented to the Commission in the context of the proposed regulation. It merely serves to fill a gap in the regulation that was recognized by staff in the course of preparing the final version of the proposed regulation.

(b)(2) [Beginning January 1, 2001, contributions received by any candidate controlled committee formed prior to January 1, 2001, for an election held after January 1, 2001, are subject to the limits of Government Code sections 85301 and 85302.]

Subdivision (b)(2), is directed to those candidate-controlled committees that were formed prior to January 1, 2001, for elections held on or after January 1, 2001. Contributions to such committees made prior to January 1, 2001, were not subject to the contribution limits of Proposition 34, which did not become effective until January 1, 2001. Subdivision (b)(2) clarifies that contributions made on or after January 1, 2001, to those committees formed prior to January 1, 2001, for elections held on or after January 1, 2001, are subject to Proposition 34's contribution limits.

³ Once a committee is closed, it cannot, technically, be "re-opened." A new committee, with a new identification number, would have to be created and designated for the old election.

Subdivision (b)(3) of the proposed regulation incorporates the requirements of the transfer regulation, Emergency Regulation 18536. It imposes the requirements of that regulation to transfers to a committee formed for an election held on or after January 1, 2001.

Subdivision (c) sets forth the Commission's decision that, with respect to elections held on or after January 1, 2001, candidates may use post-election contributions only for payment of net debts outstanding for an election.

Subdivision (d) of the proposed regulation defines "net debts outstanding," for purposes of the regulation, and also contains the last three decision points. Subdivision (d)(1) includes fundraising costs in the definition of "net debts outstanding." Subdivision (d)(2) includes in the definition post-election compliance costs and administrative costs, such as filing costs, staff salaries, and office supplies.

Substantive Decision Points

Decision 1 – Date of Valuation of Debts

Subdivision (d)(3) of the proposed regulation contains the method by which a candidate-controlled committee would actually calculate the amount of net debt at the conclusion of the election.

(d)(3) The total amount of unpaid debts, loans and accrued expenditures incurred with respect to an election {Decision 1}[as of the date of the election], less the sum of:

The bracketed language provided in **Decision 1** was added at the Commission's request that there be a date certain for valuation of the amount of "net debts outstanding." There are some advantages to imposing a date certain, in that by doing so, the amount of "net debts outstanding" would become a fixed amount more easily reducible to zero, as opposed to a more fluid figure that would be occasioned by a broader definition. It should be noted that although the date of the election fixes the obligations incurred, the figure can be adjusted as bills are received to reflect actual expenditures, as long as the debts were incurred on or prior to the date of the election.

However, there are arguments against inserting a date certain into the "obligation" aspect of the "net debts outstanding" definition. Primarily, it eliminates from "net debts outstanding" certain expenses that may not arise until after the date of the election, such as legal challenges to an election.

Staff Recommendation: Staff recommends that this language be adopted.

Decision 2 – Inclusion of “Tangible Assets” in Enumeration of Liquid Assets

Subdivision (d)(3)(A) of the proposed regulation sets forth the various liquid assets to be subtracted from the total obligations arrived at in subdivision (d)(3).

(d)(3)(A) The total cash on hand available to pay those debts and obligations, including: currency; balances on deposit in banks, savings and loan institutions, and other depository institutions; traveler’s checks; certificates of deposit; treasury bills; {Decision 2}[tangible assets, including, but not limited to, computers, printers, copiers, and telephones valued at fair market value]; and any other committee investments valued at fair market value; and

At its last meeting, the Commission asked for further research and clarification of the bracketed language in **Decision 2**. In response, staff consulted the regulations and rules promulgated by the Federal Elections Commission on campaign debt. Further investigation disclosed that the bracketed language is not included in the federal definition of “net debts outstanding.”⁴ Including the bracketed language is problematic for several reasons, including the fact that it may be difficult to value many of the assets, such as office equipment or furniture. Such items may, in fact, have only a *de minimus* value after being used for several months or years by a controlled committee. In addition, there remains the question of when to value the assets. Are they valued as of the date of the election? If so, must they be disposed of immediately, and, if so, how does the committee operate to wind down its operations and continue to collect funds to retire any remaining debt?

However, while some tangible assets, such as printers and computers, may be of negligible value at the conclusion of a campaign, some other assets, such as unique artwork, may be quite valuable. This fact supports including the value of those assets in the calculation of the candidate’s “net debts outstanding.”

Staff Recommendation: Staff makes no recommendation on this decision point. No public comment has been received on this issue.

Subdivision (d)(3)(B) of the proposed regulation sets forth the various refunds and credits owed to the committee, which are also subtracted from the total obligations arrived at in subdivision (d)(3).

Decision 3 – Designation of Contribution by Contributor

⁴ At the last Commission meeting, staff incorrectly stated that tangible assets were included in the federal definition of “net debts outstanding.” In fact, the federal definition does not include this term.

The next section explains that the balance of net debts outstanding will be reduced as contributions are received. It further states that the candidate and his or her controlled committee may accept post-election contributions if such contributions do not exceed the amount of net debts outstanding on the date the contribution is received. The bracketed language set forth in **Decision 3** was taken from the federal regulation, which requires that contributions be designated in writing for a particular election.

The candidate and his or her controlled committee(s) may accept contributions made after the date of an election {Decision 3}[if such contributions are designated in writing by the contributor for that election and] if such contributions do not exceed the amount of net debts outstanding on the date the contribution is received.

The Commission has never had a requirement in California that contributions be designated in writing by the contributor for a particular election. Regulation 18523.1 requires a candidate or a candidate's controlled committee to identify the particular controlled committee making a written solicitation for contributions and to instruct contributors to designate their contributions for that particular controlled committee. When a contributor makes a contribution or loan but fails to designate which committee a contribution is for, Regulation 18523 permits a candidate with multiple controlled committees to allocate the contribution or loan to any one of the controlled committees. Under each regulation, the onus is on the candidate or controlled committee, not on the contributor. If the Commission were to adopt the bracketed language, it would be placing the onus on the contributor for the first time.⁵

Staff Recommendation: Staff recommends that this language not be adopted.

Subdivision (e) of the proposed regulation implements Section 83 of Proposition 34 consistent with the Commission's implementation of Section 85316. The effect of subdivision (e) is to make the proposed regulation effective for candidates for statewide elective office for elections held on or after November 6, 2002 as provided in Section 83.

⁵ As has previously been mentioned, much of the "net debts outstanding" portion of this proposed regulation was taken from the federal regulation on the same subject. Likewise, this language was taken from the federal regulation, and, being aware of similar regulations on the subject, the impact of the bracketed language in **Decision 3** was only recognized by staff in the final review of the regulation.